MOTION FILED
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No. 06-300

In The
Supreme Court of the United States

JAMES FIELDS, et al.,

Petitioners,

v.

PALMDALE SCHOOL DISTRICT, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND AMICI CURIAE BRIEF OF UNITED STATES CONGRESSMEN TIM MURPHY, ROB BISHOP, TOM FEENEY, LOUIS GOHMERT, PATRICK MCHENRY, AND PAUL RYAN AND THE THOMAS MORE LAW CENTER IN SUPPORT OF PETITIONERS

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November 1, 2006

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MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF

Pursuant to Sup. Ct. R. 37, the below listed United States Congressmen and the Thomas More Law Center respectfully submit this motion for leave to file the accompanying brief of amici curiae in support of the granting of the petition for a writ of certiorari.

Representative Tim Murphy (R-PA) authored and sponsored House Resolution 547, which expressed the sense of the House of Representatives that the United States Court of Appeals for the Ninth Circuit deplorably infringed on parental rights in *Fields v. Palmdale School District.* (App., hereto, at 1-3.) Representatives Rob Bishop (R-UT), Tom Feeney (R-FL), Louis Gohmert (R-TX), Patrick McHenry (R-NC), and Paul Ryan (R-WI) were co-sponsors of House Resolution 547, which the House of Representatives adopted by a vote of 320 to 91. Each of these Representatives has an interest in upholding the rights of parents to direct and control the upbringing of their children. They urge this Court to grant the petition for a writ of certiorari.

The Thomas More Law Center is a national, nonprofit public interest law firm based in Ann Arbor, Michigan, and does not charge for its legal services. The Law Center has represented, and will continue to represent, parents in court to advance their rights, and the rights of their children, against public schools that have violated those rights. As with the Representatives, the Law Center supports the rights of parents to direct the upbringing of their children, even when attending public schools, especially with regard to religious and moral values. The Law Center has an interest in the outcome of this case, which involves legal principles impacting the public. The Law

Center urges this Court to grant the petition for a writ of certiorari.

The submitted amici curiae brief is intended to assist this Court in its analysis of the legal questions presented by the petition for a writ of certiorari. As explained in the accompanying brief, parents have a fundamental right to direct the upbringing of their children, including their religious and moral upbringing. This right encompasses controlling the sexually explicit information that is distributed to their minor children. The Ninth Circuit wrongly concluded that parental rights are eviscerated when children attend public school. The rights of parents must be balanced against the interest of a public school in providing universal education. The Ninth Circuit wrongly ignored this balancing test and wrongly rejected the fundamental rights parents continue to have while their children attend public school.

The undersigned attorney has received the consent for the filing of the amici curiae brief from petitioners' counsel. A copy of that consent letter has been filed with this motion. Respondents' counsel has withheld consent.

The amici curiae respectfully request that this Court grant this motion for leave to file the accompanying brief.

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IDENTITY AND INTEREST OF AMICI CURIAE

Representative Tim Murphy (R-PA) authored and sponsored House Resolution 547, which expressed the sense of the House of Representatives that the United States Court of Appeals for the Ninth Circuit deplorably infringed on parental rights in *Fields v. Palmdale School District*. (App., hereto, at 1-3.) Representatives Rob Bishop (R-UT), Tom Feeney (R-FL), Louis Gohmert (R-TX), Patrick McHenry (R-NC), and Paul Ryan (R-WI) were co-sponsors of House Resolution 547, which the House of Representatives adopted by a vote of 320 to 91. Each of these Representatives has an interest in upholding the rights of parents to direct and control the upbringing of their children. They urge this Court to grant the petition for a writ of certiorari.[1]

The Thomas More Law Center is a national, nonprofit public interest law firm based in Ann Arbor, Michigan, and does not charge for its legal services. The Law Center has represented, and will continue to represent, parents in court to advance their rights, and the rights of their children, against public schools that have violated those rights. As with the Representatives, the Law Center supports the rights of parents to direct the upbringing of their children, even when attending public schools, especially with regard to religious and moral values. The Law Center has an interest in the outcome of this case, which involves legal principles impacting the public. The Law

[1] No counsel for a party authored this brief in whole or in part. No person or entity aside from the amici curiae has made a monetary contribution to the preparation or submission of this brief. Sup. Ct. R. 37.6. The amici curiae have no parent corporations and no stock. Sup. Ct. R. 29.6.

Center urges this Court to grant the petition for a writ of certiorari.

SUMMARY OF THE ARGUMENT

Parents have a fundamental right to direct the upbringing of their children. Controlling the sexually explicit information that is distributed to their minor children falls under that right. Parental rights are not eviscerated when their children attend public schools, as the United States Court of Appeals for the Ninth Circuit ruled in this case. This is particularly true when the religious beliefs and practices of the family are implicated.

When a conflict exists between parents' fundamental rights concerning the religious upbringing of their children and a public school's interest in universal education, a balancing test must be employed to determine the appropriate outcome, which the Ninth Circuit failed to acknowledge or impose in this case. In this instance, Palmdale School District's interest in administering a sexually explicit survey to seven and ten year-olds is outweighed by petitioners' interest in protecting their children from this information so that they may raise their children according to their religious or moral beliefs.

ARGUMENT

A. *Parents have a fundamental right to direct the upbringing of their children.* The Ninth Circuit panel erred in concluding that the right of parents to control the sexual information presented to their children has no deep roots in our nation and is not implied in our concept of ordered liberty. According to the panel, parents have in essence no fundamental constitutional right over their children while their children are in public school, and a public school may provide young children with whatever sexually-based information the school sees fit, even though a fully informed parent would never allow his or her child to be exposed to such information, based on religious or moral grounds. The Ninth Circuit's decision is in conflict with the case law of this Court as well as with the case law of other circuit courts.

As this Court has repeatedly stated, the fundamental right of parents to direct the upbringing of their children is a well-established liberty interest under the Fourteenth Amendment to the United States Constitution.

This Court stated that this interest "[w]ithout doubt, denotes . . . the right of the individual . . . to marry, establish a home and bring up children." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Shortly thereafter, this Court elaborated, holding that an Oregon Act compelling parents to send their children to public school "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925). This Court recently affirmed this right by noting that "it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the

fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

The fundamental right of parents over their children includes many areas of family life. This Fourteenth Amendment liberty grants parents the right to decide what type of school their child will attend, to decide whether their child may learn a foreign language, to decide that religious beliefs compel exemption from compulsory school education, and to decide whether to allow visitation with other family members. *Troxel v. Granville,* 530 U.S. 57 (2000); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

In *Yoder*, 406 U.S. at 213-14, this Court explained that religion is an aspect of the fundamental right elucidated in *Pierce*. This Court characterized the right as "the traditional interest of parents with respect to the religious upbringing of their children," *id.* at 214, and explained that "the values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society." *Id.* at 213.

Beyond these constitutional rights, parents also have statutory rights over their children's education. In 2002, the United States Congress enacted a federal law that no student can be required to take a survey concerning sexual behavior or attitudes unless the school provides parents with the survey before administering the survey

to students and receives consent to administer the survey.[2] 20 U.S.C. § 1232h; *accord* Cal. Educ. Code § 51513. In addition, many states have in place laws regulating public school education that require schools to allow parents to opt their children out of certain classes and surveys dealing with sex education.[3] These federal and state laws are further evidence of the fact that parents' right to control their children's exposure to sexual education is deeply rooted in our nation's concept of ordered liberty.

The right of parents to direct the religious upbringing of their children is an established right. Sincerely held religious beliefs direct a family's mode of life, and, unsurprisingly, direct decisions on life-defining topics such as sexual activity and education. The proposition that parents have a right to direct the introduction and flow of sexual information to their children follows from these principals.

B. ***The fundamental right of parents to direct the upbringing of their children extends beyond the schoolhouse door.*** Under the Ninth Circuit panel's decision, parents' fundamental rights are eliminated for the period of time that the child is attending public school since the panel ruled that a public school may impart any

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[2] Here, the Palmdale School District subjected adolescent children, ages seven to ten, to a sexually-explicit psychological assessment survey, asking them such questions as whether they touch their "private parts too much," whether they have "sex feelings in my body," and whether they think about "having sex," all without their parents' informed consent. (Pet. at 2-3.)

[3] *E.g.*, Ariz. Rev. Stat. § 15-716; Idaho Code § 33-1611; Nev. Rev. Stat. § 389.065; Or. Rev. Stat. § 336.465; Wash. Rev. Code § 28.A.230.070.

sexually-based information to students even if their parents would object on religious or moral grounds.

The Ninth Circuit's decision conflicts with decisions from other circuit courts, which is grounds for this Court to grant the petition for a writ of certiorari. Sup. Ct. R. 10(a). Unlike the Ninth Circuit, the United States Court of Appeals for the Third Circuit has affirmed the reach of parental rights into public school in *Gruenke v. Seip*, 225 F.3d 290 (3rd Cir. 2000). In that case, a coach compelled a female student to take a pregnancy test without informing her parents. The coach made those results known to the school community, which prevented the plaintiff student and her parents from dealing with the pregnancy in a confidential manner. The Third Circuit explained:

> School-sponsored counseling and psychological testing that pry into private family activities can overstep the boundaries of school authority and impermissibly usurp the fundamental rights of parents to bring up their children, as they are guaranteed by the Constitution. *See Merriken v. Cressman*, 364 F. Supp. 913, 922 (E.D. Pa. 1973) (questionnaire probing family relationships by school authorities held unconstitutional). *Public schools must not forget that "in loco parentis" does not mean "displace parents."*[4]

Id. at 307.

In *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159 (3rd Cir. 2005), the Third Circuit, unlike the Ninth Circuit, again affirmed that parental rights apply even when children attend public school. In fact, the Third Circuit

[4] All emphasis added herein unless otherwise noted.

criticized *Fields*, noting that although they did not find a constitutional violation in *Ridgewood Bd. of Educ.*, they disagreed with the holding in *Fields*:

> In reaching this conclusion, we do not hold, as did the panel in *Fields v. Palmdale School District*, 427 F.3d 1197 (9th Cir. 2005), that the right of parents under the *Meyer-Pierce* rubric "does not extend beyond the threshold of the school door." *Id.* at 1206. Nor do we endorse the categorical approach to this right taken by the *Fields* court, wherein it appears that a claim grounded in *Meyer-Pierce* will now trigger only an inquiry into whether or not the parent chose to send their child to public school and if so, then the claim will fail.

Id. at 185 n.26.

The United States Court of Appeals for the Eleventh Circuit agrees that the *Meyer-Pierce* right exists beyond the schoolhouse gate. In *Arnold v. Bd. of Educ. of Escambia*, 880 F.2d 305 (11th Cir. 1989), *rev'd in part on other grounds by Swann v. Southern Health Partners, Inc.*, 388 F.3d 834 (11th Cir. 2004), a student's guidance counselor and principal convinced her to have an abortion without telling her parents. The Eleventh Circuit held that a parent's constitutional right to direct the upbringing of the minor was violated because the school excluded the parents from their daughter's decision about whether to have an abortion, a decision which touches fundamental values and religious beliefs parents wish to instill in their children. *Id.* at 312.

In *Moody v. Cronin*, 484 F. Supp. 270 (C.D. Ill. 1979), the district court held that an Illinois law requiring public school students to attend co-ed physical education classes

violated both the plaintiff parents' right to control the religious upbringing of their children and the plaintiff students' right to free exercise:

> This exposure also *substantially interferes* with the religious development of the Pentecostal children and their integration into the way of life of the Pentecostal faith community at the crucial adolescent stage of development. These two effects of the way this Illinois statute has been construed contravenes the basic religious tenets and practice of the Pentecostal Church, *both as to parents and the children.*

Id. at 276.

In *Moody*, as here, the issue is not whether parents or courts have the right to tell schools "what they must do, only what they may not do." *Id.* at 277. It should be a matter of common sense that parents have the right to object to school action when that action is shockingly offensive, unjustified, and impinges upon parents' right to direct the religious upbringing of their children, such as forcing elementary school children to take a sex survey in which seven to ten year-olds are asked such questions as whether they think "about touching other people's private parts." Again, "Public schools must not forget that 'in loco parentis' does not mean 'displace parents.'" *Gruenke*, 225 F.3d at 307.

The above cases illustrate that school action touching upon sexual matters implicates parental rights, including familial religious beliefs and decisions. In particular, the *Gruenke* court explicitly ruled that psychological testing in school can violate parents' fundamental right to raise their children. The contrary decision of the Ninth Circuit panel is cause for this Court's review. *See* Sup. R. Ct. 10(a).

C. ***The parents' interest in the upbringing of their children outweighs the public school's interests in conducting a sex survey on adolescents.*** Although parents retain their fundamental rights over their children even when their children attend public school, it is also true that the state has an interest in the orderly and uniform regulation of its public schools. The controlling issue is what happens when the interests of the state and the rights of parents collide. The Ninth Circuit panel ignored this issue.

In *Yoder*, this Court stated that "a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as . . . the traditional interest of parents with respect to the religious upbringing of their children." *Yoder*, 406 U.S. at 214; *accord Arnold*, 880 F.2d at 313 (when the state interest impinges upon . . . the traditional interest of parents . . . *the state interest must be balanced against the interests of the parent*).

The Ninth Circuit's decision rejected any balancing of the competing interests of parents and the public school, which is a rebuff of *Yoder*. Based on the Ninth Circuit's decision, courts will have no need to determine whether the state is achieving its interest in a manner that is appropriate and also the least restrictive of a parent's rights. *See Moody*, 484 F. Supp. at 276.

Under the Ninth Circuit's totalitarian view, once a child enters public school, the public school can do as it pleases and even ask seven year-olds whether they think about sex and about touching their private parts or those of their friends. The parents only recourse is to remove

their children from the public schools and either home school them or send them to private school, which are not true options for many parents lacking the wherewithal.

Based on the Ninth Circuit's decision, the public school has displaced the parent during school hours and has taken control of the child, in total contravention of basic principles set forth by this Court. *See, e.g., Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 511 (1969) ("In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students.").

CONCLUSION

This Court should grant a writ of certiorari. This Court should resolve the questions of national importance presented by this case and resolve the conflict caused by the Ninth Circuit's decision.

Respectfully submitted,
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November 1, 2006

H. Res. 547

In the House of Representatives, U.S.,
November 16, 2005.

Whereas the Palmdale School District sent parents of elementary school students at Mesquite Elementary School in Palmdale, California a letter requesting consent to give a psychological assessment questionnaire to their first, third, and fifth grade students;

Whereas without the informed consent of their parents, the young students were instead administered a questionnaire that contained sexually explicit and developmentally inappropriate questions;

Whereas seven parents subsequently filed a complaint against the Palmdale School District in a Federal district court;

Whereas on November 2, 2005, a 3-judge panel of the Ninth Circuit Court of Appeals affirmed the decision of the United States District Court for the Central District of California in the case (Fields v. Palmdale School District) and held that parents "have no constitutional right . . . to prevent a public school from providing its students with whatever information it wishes to provide, sexual or otherwise, when and as the school determines that it is appropriate to do so";

Whereas the Ninth Circuit stated, "once parents make the choice as to which school their children will attend, their fundamental right to control the education of their children is, at the least, substantially diminished";

Whereas in Meyer v. Nebraska, 262 U.S. 390, 401 (1923), the Supreme Court recognized that the liberty guaranteed by the 14th amendment to the Constitution encompasses "the power of parents to control the education of their [children]".

Whereas the Supreme Court in Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925), highlighted the Meyer doctrine that parents and guardians have the liberty "to direct the upbringing and education of children under control" and emphasized that "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations";

Whereas in Wisconsin v. Yoder, 406 U.S. 205, 232-33 (1972), the Supreme Court acknowledged that "[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition. . . . The duty to prepare the child for 'additional obligations', referred to by the Court [in Pierce] must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship";

Whereas a plurality of the Supreme Court has stated, "it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children" (Troxel v. Granville, 530 U.S. 57, 66 (2000) (plurality opinion));

Whereas the Ninth Circuit's decision in Fields v. Palmdale School District presupposes that "parents make the choice as to which school their children will attend" when, in fact, many parents do not have such a choice;

Whereas the decision in Fields establishes a dangerous precedent for limiting parental involvement in the public education of their children; and

Whereas the rights of parents ought to be strengthened whenever possible as they are the cornerstone of American society: Now, therefore, be it

Resolved, That it is the sense of the House of Representatives that –

(1) the fundamental right of parents to direct the education of their children is firmly grounded in the Nation's Constitution and traditions;

(2) the Ninth Circuit's ruling in Fields v. Palmdale School District undermines the fundamental right of parents to direct the upbringing of their children; and

(3) the United States Court of Appeals for the Ninth Circuit should agree to rehear the case en banc in order to reverse this constitutionally infirm ruling.

Attest:

Clerk: